JAN 2 1952
CHARLES ELMORE CROPLE
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 511

ROBERT CARROLL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent

APPLICATION FOR CERTIORARI WITH BRIEF ANNEXED

E. GUY HAMMOND,
For Petitioner,
First National Tower,
Akron, Ohio.

INDEX

The Application for the Writ is paged separately and independently.

	Page
Application for Writ of Certiorari	1
Supporting Brief Annexed	5
Acknowledgement of Service by Respondent's Attorney	5
Introductory Statement of Brief	5
Question Presented	5
U. S. Supreme Court Decisions, Pg. 6 of Brief	6
The Hitler Concept, Pg. 7 of Brief	7
Susceptibility of the One Affected	8
Conclusion	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 511

ROBERT CARROLL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent

APPLICATION FOR WRIT OF CERTIORARI WITH SUPPORTING BRIEF

The petition of the undersigned, Robert Carroll, respectfully asks for a writ of certiorari to be directed to the Supreme Court of Ohio, where the record of the case in question is now lodged, by which record will appear the action and procedure herein complained of, that the same was commenced in the Common Pleas Court of Summit County, Ohio, by an Affidavit of Information which was filed in said court, in its essential parts charging that:

> ". . . on frequent intervals between September 1st, 1950, and December 11th, 1950, at the County of Summit aforesaid, Robert Carroll . . . did act in a way tending to cause the delinquency of Marlyn Mathis, then and there being a minor under the age of 18 years, to wit: of the age of 17 years, in this to wit: etc." (See Record Page 11.)

The charge was brought under the Ohio Statute providing:

> "Whoever abuses a child . . . or acts in a way tending to cause delinquency in such child . . . shall be fined . . . or imprisoned, etc." Ohio General Code, Sec. 1639-45.

Petitioner entered a plea specifically limited to the words of the statute, thus:

> "Guilty of acting in a way tending to cause delinquency in a minor." See Record, Page 11.

On this plea, without other proof, the trial court sentenced defendant to ninety (90) days in jail, from which sentence he appealed to the Court of Appeals on the grounds following:

1. The statute on which the charge is founded is unconstitutional because of indefiniteness and uncertainty.
2. The judgment and sentence of the lower court is contrary to the fundamental law of Ohio, established by the Constitution of Ohio (Art. 1, Sec. 10).
3. By reason of the judgment and sentence of the trial court the defendant is deprived of his liberty without due process of law as guaranteed by the Constitution of the United States, 14th Amendment.

The said Court of Appeals affirmed the judgment of the trial court and from this affirmation appeal was made to the Supreme Court of Ohio, on the same grounds as urged in the Court of Appeals and specified above, specification No. 1 being stated more explicitly as follows:

> "The trial court committed error by imposing sentence . . . under authority of the statute which is repugnant to Art. 1, Sec. 10 of Ohio Constitution, and also to the due process clause of the Federal Constitution."

On October 10, 1951, said Supreme Court of Ohio refused to entertain the appeal, making the entry as follows:

> "It is ordered and adjudged that this appeal as of right be and the same hereby is, dismissed for the reason that no debatable constitutional question is involved." Record, Page 2.
>
> NOTE: The decision was not unanimous. One of the seven judges did not concur. Ib.

II. Basis of Jurisdiction of This Court

The jurisdiction of the Federal Supreme Court is invoked under Section 1257, Title 28, U. S. Code, providing:

> "Final judgments or decrees rendered by the highest court of a State, . . . may be reviewed by the Supreme Court as follows:
>
> • • • • •
>
> (3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States."

III. Federal Cases Relied On

We rely substantially on the case of *Musser* v. *Utah*, reported in 92 L. Ed. page 562, and the line of similar decisions, among others, as follows:

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516;

Weeds v. *U. C.*, 65 L. Ed. 537;

J. Burns Baking Co. v. *Bryan*, 68 L. Ed. 813;

Lanzetta v. *New Jersey*, 306 U. S. 451, 83 L. Ed. 888;

Stromberg v. *California*, 283 U. S. 359.

IV. In Conclusion

Your petitioner prays that a writ of certiorari issue under seal of this Court to the Supreme Court of Ohio, command-

ing said court to certify under its seal and send to this Court on a day certain to be named and specified, a full and complete Transcript of the record and proceedings of said Supreme Court of Ohio in this cause, to the end that its said judgment may here be reviewed, considered and determined as provided by law and that this Court may correct the errors complained of herein, reverse said judgment of the Supreme Court of Ohio, remand said cause and grant such other and further relief as from the nature of the case your petitioner may be entitled to receive.

ROBERT CARROLL,
Petitioner,
By E. GUY HAMMOND,
His Attorney,
621 First National Tower,
Akron, O.
Phone: FRanklin 0269.

BRIEF ANNEXED TO PETITION FOR THE WRIT

I. Introductory Statement

In essential parts, the charge against the petitioner in the lower courts was that:

> Robert Carroll . . . did act in a way tending to cause delinquency of Marilyn Mathis, etc. See Record, Page 11.

The statute under which the above charge was drawn provides:

> Whoever abuses a child . . . or acts in a way *tending to cause* delinquency in such child, . . . shall be fined . . . or imprisoned, etc. Ohio Gen'l Code, Sec. 1639-45.

The "child", in this case, was just under 18 years.

As stated in the Petition, defendant entered a plea strictly limited to the words of the statute, thus:

> "Guilty of acting in a way tending to cause delinquency in a minor." See Record Page 11.

On this plea alone, without other proof, the trial court imposed sentence as follows:

"January 13—

> "It is the sentence of the law and the order of the Court that the defendant be confined in the County Jail for 90 days, etc." Record Pg. 11.

II. Question Presented

The one question is, whether the State Statute is so vague and uncertain that it cannot be sustained under either the State or Federal Constitution, as indicated by both State and Federal Supreme Court Decisions.

As to the phrase "acting in a way *tending* to cause delinquency, the following:

> The word 'tending' is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act, in a given case, is one tending to commit a crime. *Rizzo* v. *State*, 246 N. Y., Pg. 336.
>
> Statutes which create crimes must be sufficiently definite in specifying the conduct commanded or prohibited, . . . that the *ordinary member* of society may know how to comply with their requirements. *Comm.* v. *Pentz*, 247 Mass. 500.

I am persuaded that neither any "ordinary member of society" nor any extraordinary member or Jurist would be able to tell what conduct is included in "acting in a way tending to cause delinquency"—or what conduct is excluded.

U. S. Supreme Court Decisions

> Statutes defining crimes run afoul of the due process clause if they fail to give adequate guidance to those who would be law-abiding or advise defendants of the 'nature and cause' of the offense. *Musser* v. *Utah*, 92 L. Ed. 562.
>
> "It would seem to be warrant for conviction . . . of almost anything, any act the judge and jury might find at the moment to be contrary to his or its notion.
>
> In some states . . . it would be likely to punish acts not punishable in others because of the varying policies on such matters as the use of cigarettes, liquor, or the permissibility of gambling. *Musser* v. *Utah*, *Supra*, Pg. 1 of Opinion.

To the same general effect, see:

U. S. v. *Cohen Grocery Co.*, 65 L. Ed. 516;
U. S. v. *Reese*, 23 L. Ed. 563;
Stromberg v. *California*, 283 U. S. 359, 75 L. Ed. 1117.

The decision of the Ohio Supreme Court was not unanimous and, at the hearing there, one of the Judges offered

substantially the same argument as that given in the case of *Musser* v. *Utah, supra.* Whatever act the Prosecutor sees fit to charge as "tending to cause", that is a crime.

This kind of law that measures by the side of "the Chancellor's foot", in modern colors, in the dominant principle in

The Hitler Concept Also

So, Arthur Seyes-Inquart, Reich Commissar of Holland, decreed that crime, any crime was defined as:

> An act punishable *according to a healthy sense of justice,* . . . punishment to be inflicted in the discretion of the judge, even though the act does not fall under any express prohibition of statute. New York Law Journal, Akron Legal News, 11-16-43, p. 3.

The Statute Is Questioned—Not the Charge

One more point to be noticed is that our complaint is levelled against the statute, not against the charge made under it.

The acts relied on as "tending to cause delinquency" are specified in the charge as sexual relations.

No evidence is offered as to this allegation, however, and we insist that the sufficiency of the charge, should it be held sufficient, *cannot help the insufficiency of the statute* under which it is drawn:

> Specifications of the details of the offence . . . will not serve to validate it, it being the statute and not the accusation under it that prescribes the rule. *Lanzetta* v. *New Jersey,* 306 U. S. 451, 83 L. Ed. 888.
>
> It Is the Statute and Not the Accusation Under It that prescribes the rule to govern conduct and warns against transgressions . . . and no one may be required, at the peril of life or liberty or property to speculate as to the meaning of penal statutes. All are

entitled to be informed of what the state commands or forbids. Ib.

See Also:

Stromberg v. *California,* 283 U. S. 359;
People v. *O'Gorman,* 274 N. Y. 284;
Stone v. *State,* 220 Ind. 165.

Susceptibility of the One Affected

It also ought to be considered, as it seems to me, that the susceptibility of the one affected has a large part in determining whether the act complained of is "acting in a way tending to cause."

An act might be wholly innocent and innocently intended so far as the actor is concerned, and harmless in effect as to the average person but detrimental to another, depending on the susceptibility of the one to be affected.

Girls just under 18 manifest widely varying degrees of susceptibility: a smile, a wink, a date to go swimming with some gorgeous young fellow, a game at cards, in the eyes of some, a beauty contest in the nude, or near nude, where intimate measurements are taken in public—many acts might be named as "acting in a way *tending* to cause", for a tendency is so slight a thing: just one degree out of poise, and there you are.

So an act is criminal or not according to the susceptibility of the one affected:

> All things are infected the infected spy,
> As all seem yellow—to the jaundiced eye—*Pope.*

> For virtue, as it never will be moved,
> Though lewdness court it in the shape of Heaven,
> So lust, though to a radiant angel linked
> Will sate itself in a celestial bed and prey on garbage.
>
> *Shakespeare.*

There is no standard—as this Court has said in another case: "No standard of criminality."

It all comes at last to the Hitler concept, where a man is punished—not according to any rule of law, but "according to a healthy sense of justice."

And that sense varies tremendously through different communities and different courts.

The judgment of the Supreme Court of Ohio, or its failure to take jurisdiction and to pronounce judgment, creates a precedent effective all over the State and leaves this abominable pretense of a statute to be applied—not according to any abiding principle but according to the healthy or unhealthy sense of justice prevailing among jurors of different communities or in the courts.

We submit that the action of the State Supreme Court ought not to be allowed to become a precedent.

Respectfully submitted,

E. Guy Hammond,
For Petitioner,
621 First National Tower,
Akron, Ohio.
Phone: FRanklin 0269.